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In The
# Supreme Court of the United States

BURL CAIN, et al.,

*Petitioners,*

versus

ROBERT KING WILKERSON, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Court of Appeals for the Fifth Circuit interpreted *Sandin v. Conner*[1] as adopting a *replacement test* for determining if a liberty interest protected by the Due Process Clause was created by a State. The Fifth Circuit rejected the petitioners' argument that *Sandin* instead added an *additional prong* (the "atypical and significant hardship" inquiry) to the pre-existing liberty interest analysis. Was the Fifth Circuit correct?

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[1] 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

## PARTIES

The parties in this Court and the courts below are as follows:

*Petitioners*: Burl Cain, Tom Norris, Richard Peabody, Major R. Rachal, Colonel Sam Smith, and Major Paul J. Myers were the defendants in the district court and the appellants in the Court of Appeals.

*Respondents*: Robert King Wilkerson, Albert Woodfox, and Herman Wallace were the plaintiffs in the district court and the appellees in the Court of Appeals.

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## PETITION FOR WRIT OF CERTIORARI

The petitioners, Louisiana prison officials, urge this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit that affirmed the district court's denial of the prison officials' qualified immunity-based motion to dismiss respondent inmates' procedural due process claims for monetary damages. In doing so, the Fifth Circuit took sides in a circuit split on the proper interpretation of this court's decision in *Sandin v. Conner*.[2]

## OPINIONS BELOW

The 14 May 2003 opinion of the United States Court of Appeals for the Fifth Circuit is reported[3] and is reprinted in the Appendix to this petition, App. 1. The district judge's 22 April 2002 ruling adopting the 28 March 2002 magistrate judge's report and denying the prison officials' qualified immunity-based motion to dismiss is unreported and is reprinted at App. 11. The 28 March 2002 magistrate judge's report is unreported and is reprinted at App. 13.

## JURISDICTION

This Court has jurisdiction under 28 USC §1254(1). The judgment of the United States Court of Appeals for

[2] 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

[3] *Wilkerson v. Stalder*, 329 F.3d 431 (5th Cir. 2003).

the Fifth Circuit was entered on 14 May 2003. That judgment affirmed the district judge's denial of the prison officials' qualified immunity-based motion to dismiss.

The Fifth Circuit had jurisdiction under the collateral order doctrine over the prison officials' appeal from the district court's denial of their qualified immunity-based motion to dismiss. *Mitchell v. Forsyth*.[4]

The district court had subject matter jurisdiction under 28 USC §1331 (federal question) over the inmates' 14th Amendment due process claims. The inmates originally filed their suit in a Louisiana state district court. The prison officials timely removed it to federal district court.

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The following constitutional and statutory provision is involved:

*United States Constitution*

**U.S. Constitution, Fourteenth Amendment, §1** (1868):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

[4] 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### A. Parties.

The petitioners ("prison officials") are:

1. Burl Cain, Warden of the Louisiana State Penitentiary (LSP) at Angola, Louisiana;
2. Tom Norris, a Classification Officer at LSP;
3. Richard Peabody, Deputy Warden for Security at LSP;
4. Major R. Rachal, a Corrections Officer at LSP;
5. Col. Sam Smith, a Corrections Officer at LSP; and
6. Major Paul J. Myers, a Corrections Officer at LSP.

The respondents – Robert King Wilkerson, Albert Woodfox, and Herman Wallace – at all times relevant hereto were convicted felons sentenced to the custody of the Louisiana Department of Public Safety and Corrections ("Department") and were incarcerated at LSP. Respondents Woodfox and Wallace remain incarcerated at LSP. Respondent Wilkerson was released from prison in 2001.

### B. Facts and claims.

The issue presented to this court involves whether the prison officials deprived the inmates of a state created liberty interest protected by the Due Process Clause when they did not release the inmates from extended lockdown. Accordingly, the facts presented here relate to the inmates' 14th Amendment due process claim. The inmates' Eighth Amendment conditions of confinement claims were not before the Fifth Circuit and are not before this court – those claims remain pending in the district court.

As the Fifth Circuit noted,[5] prison officials placed the 3 respondent inmates in extended lockdown in 1972 – Wallace and Woodfox for killing a prison guard and Wilkerson for killing a fellow inmate. Wallace remains in lockdown. Wilkerson remained in lockdown until his release from prison in 2001. Woodfox remains in lockdown and has been there continuously except for a 3 year period (not relevant to this case) when he was housed in a parish jail.

Under Louisiana prison rules, an inmate in extended lockdown appears before a Lockdown Review Board every 90 days for review.[6] The inmates claim that the Review Board hearings are shams and that they are told they remain in extended lockdown due to the "nature of original reason for lockdown" (i.e., the killing of the prison guard and the inmate).[7]

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[5] App. 2-3 and p. App. 7.

[6] App. 3.

[7] App. 3-4.

The prison officials assert that the issue of the process before the Review Board is irrelevant because the inmates fail to make the required threshold showing in a due process claim: that the Review Board deprived them of a liberty interest protected by the Due Process Clause when the Board did not release the inmates from lockdown. Only after finding the deprivation of a protected interest does the court look to see if the State's procedures comport with due process. *American Manufacturers Mutual Insurance Company v. Sullivan.*[8]

Specifically, the prison officials assert that the inmates have no protected liberty interest in release from extended lockdown because there is no Louisiana law or prison rule or regulation that creates an entitlement to release from lockdown. The prison officials assert that *Sandin* did not eliminate the pre-*Sandin* rules for determining if a State created a liberty interest. Instead, *Sandin* added the additional requirement (referred to in this application as the "additional prong" theory) that in order to be protected by the Due Process Clause the deprivation must impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life".[9]

As a result, establishing a deprivation of *Sandin* significance is ***a necessary but not a sufficient condition*** for the inmates to prevail on their liberty interest

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[8] 526 U.S. 40, 60, 119 S.Ct. 977, 989, 143 L.Ed.2d 130 (1999), *citing, Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976).

[9] *Sandin v. Conner*, 515 U.S. at 484, 115 S.Ct. at 2300.

claims. To prevail, the inmates ***must also establish*** that the State of Louisiana in fact created a liberty interest under the pre-*Sandin* liberty interest analysis prong. Under that analysis, a state may create liberty interest when it places "substantive limitations on official discretion".[10] The State's statutes, rules, or regulations must establish substantive predicates governing official decision-making and then mandate the outcome to be reached upon a finding that the relevant criteria have been met.[11] Further, to create a liberty interest, there must be explicitly mandatory language, *i.e.*:[12]

> specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest.

Since the prison officials raised this issue in the qualified immunity context in their motion to dismiss, the burden fell on the inmates to identify the source of their alleged liberty interest. The inmates identified 2 regulations as possible sources of their state created liberty interest, neither of which is sufficient to create a liberty interest in release from extended lockdown under *Thompson*, *Olim*, and *Hewitt*.

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[10] *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462, 109 S.Ct. 1904, 1909, 104 L.Ed.2d 506 (1989), *citing*, *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983).

[11] *Thompson*, 490 U.S. at 462, 109 S.Ct. at 1909, *citing*, *Hewitt v. Helms*, 459 U.S. 460, 472, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983).

[12] *Thompson*, 490 U.S. at 463, 109 S.Ct. at 1910, *citing*, *Hewitt*, 459 U.S. at 471-72, 103 S.Ct. at 871-72.

The first regulation – cited in the inmates' Fifth Circuit brief at pp. 9-10 – only involves limits on original placement in extended lockdown. It does not address conditions for release from lockdown. The second regulation – cited in the inmates' Fifth Circuit brief at pp. 10-11 – generally describes and defines the status of extended lockdown but contains no criteria at all for release from lockdown. Accordingly, the inmates failed to identify any Louisiana statute, rule, or regulation that created an entitlement (as opposed to a hope) of release from lockdown.

Both the district court and the Fifth Circuit rejected the prison officials' "additional prong" interpretation of *Sandin*. Those courts held that the existence or non-existence of Louisiana statutes, rules, or regulations on the subject is irrelevant post-*Sandin*. Instead, they interpreted *Sandin* as adopting a *replacement test* (the "atypical and significant hardship" inquiry) that completely eliminated the pre-*Sandin* liberty interest jurisprudence in cases such as *Thompson*, *Olim*, and *Hewitt*.

The proper interpretation of *Sandin* – the "additional prong" theory or the "replacement test" theory – is the issue presented to this court for review.

### C. Procedural history.

On 30 March 2000 the inmates filed suit against several Louisiana prison officials including petitioners Burl Cain and Tom Norris in the 19th Judicial District Court in and for East Baton Rouge Parish, Louisiana. That suit included a 14th Amendment procedural due process claim asserted via 42 USC §1983. On 4 April 2000 the defendants were served with process and on 27 April

2000 these defendants filed a notice of removal in the United States District Court for the Middle District of Louisiana and paid the requisite filing fee. The federal district court had subject matter jurisdiction under 28 USC §1331 (federal question).

On 9 May 2000 the defendants, including petitioners Cain and Norris, filed a motion to dismiss the inmates' complaint. That motion asserted, *inter alia*, qualified immunity. On 15 August 2000 the inmates filed an opposition to the motion to dismiss.

Also on 15 August 2000 the inmates filed a motion for leave to file an Amended Complaint. On 15 September 2000 Magistrate Judge Dalby granted the motion and on 18 September 2000 the Amended Complaint was filed. The Amended Complaint dropped the inmates' claims against several defendants and added claims against petitioners Richard Peabody, R. Rachal, Sam Smith, and Paul Myers.

On 26 October 2000 petitioners Cain and Norris filed a motion to dismiss the inmates' Amended Complaint. No appearance was made on behalf of newly added petitioners Peabody, Rachal, Smith, or Myers because they had not been served. On 4 December 2000 the inmates filed an opposition to the motion to dismiss the Amended Complaint. Also on 4 December 2000 the inmates filed a motion for leave to file a Second Amended Complaint.

On 12 January 2001 Magistrate Judge Docia L. Dalby held oral argument on the prison officials' motions to dismiss. Petitioners Richard Peabody, Sam Smith, and Paul Myers were served after the other defendants filed their motions to dismiss. The court allowed defendants' counsel to orally adopt the motions to dismiss on behalf of Peabody, Smith and Myers (rather than require them to

file a separate written motion to dismiss that would assert the same legal arguments). The court also granted the inmates' motion to file their Second Amended Complaint. The court signed a separate written order to that effect. On 12 January 2001 the Second Amended Complaint was filed. The court took the petitioners' motions to dismiss under submission.

On 22 May 2001 plaintiff Robert King Wilkerson filed an unopposed motion to voluntarily dismiss his claims for injunctive relief based upon the fact that he had been released from prison. On 25 May 2001 Judge Ralph E. Tyson granted that motion.

On 28 March 2002 Magistrate Dalby filed a magistrate judge's report concerning the prison officials' motions to dismiss. App. 13. She recommended that the court grant the motions as to the monetary damage due process claims against Stalder and deny the motions in all other respects. She specifically recommended that the court deny the prison officials' qualified immunity defense on the inmates' procedural due process claim.

On 11 April 2002 the prison officials timely filed an objection to the magistrate judge's report. On 22 April 2002 Judge Tyson issued a Ruling in which he approved the magistrate judge's report, adopted it as the court's opinion, and denied the petitioners' qualified immunity-based motion to dismiss. App. 11.

On 2 May 2002 the prison officials filed a timely notice of appeal from Judge Tyson's 22 April 2002 ruling denying their qualified immunity-based motion to dismiss. The Fifth Circuit had jurisdiction over that appeal under the collateral order doctrine. *Mitchell v. Forsyth, id.*

On 14 May 2003 the Fifth Circuit affirmed in a reported opinion. *Wilkerson v. Stalder*.[13] The Fifth Circuit held that *Sandin* eliminated the then-existing liberty interest jurisprudence in cases such as *Thompson*, *Olim*, and *Hewitt* and instituted a replacement test based solely upon whether the inmate suffered an "atypical and significant hardship".

## REASONS FOR GRANTING THE WRIT

### I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER CIRCUITS REGARDING THE INTERPRETATION OF THIS COURT'S *SANDIN* DECISION. THE FIFTH CIRCUIT'S DECISION ALSO CONFLICTS BOTH WITH THE TEXT OF *SANDIN* AND WITH THE RATIONALE UNDERLYING IT.

The Court of Appeals for the Fifth Circuit took sides in a circuit split and interpreted *Sandin v. Conner* as adopting a *replacement test* for determining if a State created a liberty interest protected by the Due Process Clause. The Fifth Circuit rejected the petitioners' argument that *Sandin* instead added an *additional prong* (the "atypical and significant hardship" inquiry) to the pre-existing liberty interest analysis. This Court should grant certiorari to resolve this circuit split on the proper interpretation of *Sandin*. Supreme Court Rule 10(a).

[13] 329 F.3d 431 (5th Cir. 2003), reprinted at App. 1.

### A. There is a circuit split on the proper interpretation of *Sandin*.

The Circuits are split on whether *Sandin* adopted a "replacement test" or whether it added an "additional prong" to the pre-existing liberty interest analysis.

#### 1. The Second and Third Circuits have adopted the "additional prong" theory.

Very shortly after the *Sandin* decision, in *Frazier v. Coughlin*[14] the 2nd Circuit found that:[15]

> nothing in *Sandin* suggests that a protected liberty interest arises in the absence of a particular state regulation or statute that (under *Hewitt*) would create one. To prevail, [the plaintiff] must establish both that the confinement or restraint creates an "atypical and significant hardship" under *Sandin*, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint. (footnote omitted)

The 2nd Circuit repeated that holding in *Tellier v. Fields*,[16] which stated that the liberty interest analysis is now a 2-prong test. The 1st prong is the *Sandin* inquiry:[17]

> First, we examine whether the alleged deprivation was atypical and significant. We have previously held that whether a plaintiff's confinement

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[14] 81 F.3d 313 (2nd Cir. 1996).

[15] 81 F.3d at 317.

[16] 280 F.3d 69 (2nd Cir. 2000).

[17] 280 F.3d at 80.

> satisfies the "atypical and significant hardship" requirement involves factual determinations.

The 2nd prong is the pre-*Sandin* mandatory language test:[18]

> Second, we must examine whether the state has created a liberty interest by statute or regulation. In conducting this examination, we have held that *Sandin* "abandoned the framework established in *Hewitt* for analyzing whether a prisoner who is subjected to a disciplinary confinement had been deprived of a liberty interest." *Sandin*, however, rejected only the portion of *Hewitt* stating that "the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, ***forces*** a conclusion that the State has created a liberty interest." (emphasis in original and internal citations omitted)

*See also*: *Anderson v. Recore*[19] (if an inmate has not suffered a deprivation so severe as to violate the Due Process Clause by its own force, the inmate must, in the intra-prison disciplinary context, show both an atypical and significant deprivation and a source for entitlement to protection of that interest in state law or policy).

The 3rd Circuit also adopted the "additional prong" theory in *Torres v. Fauver*,[20] which interpreted *Sandin* as holding:[21]

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[18] *Id.*

[19] 317 F.3d 194, 199-200 (2nd Cir. 2003).

[20] 292 F.3d 141 (3rd Cir. 2002).

> that mandatory language in a state law or regulation can create a protected liberty interest only if the alleged deprivation "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life".

### 2. The Fifth, Seventh, Eighth, Tenth, and D.C. Circuits have adopted the "replacement test" theory.

In addition to the Fifth Circuit in this case, several other Circuits have interpreted *Sandin* in support of the "replacement test" theory.

As the Fifth Circuit noted, the D.C. Circuit adopted the "replacement test" theory in *Hatch v. District of Columbia*.[22] (*Sandin* shifted the focus of the liberty interest inquiry from the language of a particular regulation to the nature of the deprivation).

The Seventh may have adopted the "replacement test" theory. *Rowe v. Shake*[23] ("Moreover we note that Mr. Rowe's due process arguments based on the mandatory language of Indiana statutes and prison regulations are foreclosed by the Supreme Court's decision in *Sandin v. Conner*."). However, an earlier Seventh Circuit case apparently adopted the "additional prong" theory. *Wagner v. Hanks*[24] ("*Sandin* shifted the focus from whether there

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[21] 292 F.3d at 151.

[22] 184 F.3d 846, 851 (D.C. Cir. 1999).

[23] 196 F.3d 778, 782-83 (7th Cir. 1999).

[24] 128 F.3d 1173, 1173 (7th Cir. 1997).

was an entitlement to whether the entitlement was to some meaningful amount of liberty.").

The Eighth Circuit adopted the "replacement test" theory. *Hake v. Clarke*[25] (after *Sandin*, "the *Thompson* test, on which the district court relied in determining whether the State had created a liberty interest, may no longer be good law.").

The Tenth Circuit apparently adopted the "replacement test" theory. *Cosco v. Uphoff*.[26] However, as with the Seventh Circuit, an earlier case apparently adopted the "additional prong" theory. *Riddle v. Mondragon*[27] (prison policies and regulations may create a protected liberty interest in limited circumstances.).

### B. The language of *Sandin* itself supports the "additional prong" theory.

The "additional prong" theory is clearly supported by the language in *Sandin* holding that a State:[28]

> *may* under certain circumstances create liberty interests which are protected by the Due Process Clause. (emphasis added)

Further, this Court held in *Sandin* that inmate Conner's confinement in segregation did not present the type of deprivation:[29]

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[25] 91 F.3d 1129, 1132 (8th Cir. 1996).

[26] 195 F.3d 1221, 1223-24 (10th Cir. 1999), cert. denied, 531 U.S. 1081, 121 S.Ct. 784, 148 L.Ed.2d 680 (2001).

[27] 83 F.3d 1197, 1206 (10th Cir. 1996).

[28] *Sandin*, 515 U.S. at 484, 115 S.Ct. at 2300.

> in which a State *might* conceivably create a liberty interest. (emphasis added)

It seems obvious that if the State "may under circumstances" or "might conceivably" create protected liberty interests, then the action of the State in actually creating a liberty interest is still relevant post-*Sandin*. The whole tenor and thrust of the *Sandin* decision was to eliminate inconsequential claims from due process liberty interest protections. In reaching that desired end, it was not necessary to completely eliminate the pre-*Sandin* inquiry, namely, whether the State intended to create an inmate's entitlement to a particular result.

### C. The "replacement test" theory produces the same undesirable effects that lead this court to decide *Sandin* in the first place.

In *Sandin*, this Court noted that its then-existing liberty interest caselaw had produced "at least two undesirable effects".[30] The "replacement test" theory also has those same undesirable effects.

The first problem produced by this court's pre-*Sandin* case law was that it created:[31]

> disincentives for States to codify prison management procedures in the interest of uniform treatment.

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[29] *Sandin*, 515 U.S. at 486, 115 S.Ct. at 2301.

[30] 515 U.S. at 482, 115 S.Ct. at 2299.

[31] *Id.*

The "replacement test" theory creates a similar undesirable result. Under that theory, the State creates a liberty interest not by its own affirmative choice by enacting a statute, rule, or regulation, but instead merely by treating some inmate "significantly" or "atypically" worse than other inmates. This results in a significant incentive for prison officials to treat all inmates substantially the same, regardless of the inmate's behavior in prison, undoubtedly resulting in "lowest common denominator" prison conditions. Prison officials have an incentive to eliminate privileges for well-behaved inmates so that they do not face lawsuits from misbehaving inmates who, as the consequence of their misbehavior, do not receive those privileges. *See for example*: *Vincent v. State through Dept. of Public Safety and Corrections*.[32]

The second undesirable result the *Sandin* court noted was that:[33]

> the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.

The "replacement test" theory creates the same problems. In this case, the Fifth Circuit noted that upon remand, the district court must first determine the appropriate baseline against which to measure the inmates' confinement

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[32] 2002-2444, pp. 4-5 (La.App. 1 Cir. 6/6/03), ___ So.2d ___, ___ (2003 WL 21297326) (If the state is forced to fully litigate all inmate lost property claims, it will place greater restrictions on what personal property inmates are allowed to keep in their cells in order to avoid litigation costs.).

[33] 515 U.S. at 482, 115 S.Ct. at 2299.

and must next determine whether these inmates' confinement is "atypical" when compared to the appropriate baseline.[34] The determination of whether a particular deprivation imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" involves an incredibly fact-intensive and fact-specific inquiry, delving into the *minutiae* of prison conditions. This inquiry will involve an incredibly detailed examination of the specific privileges afforded to inmates in and out of extended lockdown.

In making this inquiry, one court felt it necessary to examine what specific type of personal clothing (as opposed to state-issued clothing) an inmate was allowed in "administrative custody", even noting the inmate was allowed "Two (2) pairs of personal undergarments".[35] Counting up an inmate's personal underwear involves the federal courts in day-to-day prison management in a manner at least as intrusive as that disclaimed by this Court in *Sandin*.

By contrast, the "additional prong" theory advanced by the prison officials allows the courts to resolve the inmates' procedural dues process claims by examining the 2 short prison rules identified by the inmates as the source of their alleged liberty interest in release from lockdown. A wide-ranging, fact-intensive examination of Louisiana prison conditions in lockdown as compared to out of lockdown is not necessary.

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[34] *Wilkerson*, 329 F.3d at 436.

[35] *Griffin*, 112 F.3d at 707.

## CONCLUSION

This Court should grant a writ of certiorari and decide whether the *Sandin* decision adopted a *replacement test* for determining if a liberty interest was created by a State or whether *Sandin* instead added an *additional prong* (the "atypical and significant hardship" inquiry) to the pre-existing liberty interest analysis.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30516

ROBERT KING WILKERSON; ALBERT WOODFOX; HERMAN WALLACE

Plaintiffs-Appellees

v.

RICHARD L. STALDER; ET AL

Defendants

RICHARD L. STALDER; BURL CAIN; TOM NORRIS; RICHARD PEABODY; R. RACHAL; SAM SMITH; PAUL J. MYERS

Defendants-Appellants

Appeal from the United States District Court
for the Middle District of Louisiana

(Filed May 14, 2003)

Before KING, Chief Judge, DAVIS, Circuit Judge and ROSENTHAL*, District Judge.

W. EUGENE DAVIS, Circuit Judge:

I.

Louisiana State Penitentiary officials challenge the district court's order denying in part their Motion to

* District Judge of the Southern District of Texas, sitting by designation.

Dismiss on grounds of qualified immunity a § 1983 suit filed against them by three inmates. The district court ruled that the evidence, when viewed in a light most favorable to the inmates, showed that the prison officials violated due process rights secured to the inmates under the Fourteenth Amendment, and that the law was clearly established at the time of the violation. For the reasons provided below, we affirm the district court's denial of the prison officials' Motion to Dismiss.

## II.

Robert Wilkerson, Albert Woodfox and Herman Wallace (collectively "inmates") sued a number of prison officials and alleged that their confinement in extended lockdown for approximately thirty years violates the Eighth Amendment's guarantee against cruel and unusual punishment. They further alleged that the "sham" reviews of their continued confinement in extended lockdown violate their right to procedural due process guaranteed by the Fourteenth Amendment. The inmates sought compensatory damages, punitive damages, and declaratory and injunctive relief.

Before 1972, the inmates were sentenced to the custody of the Louisiana Department of Public Safety and Corrections ("Corrections") and were confined at the Louisiana State Penitentiary at Angola, Louisiana ("Angola"). The inmates named as defendants seven officials, including the Secretary of Corrections, the Warden and Deputy Warden of Angola, and other corrections officers (collectively "prison officials").

Prison officials placed the inmates in extended lockdown in 1972. Wallace remains in lockdown. Wilkerson

remained in extended lockdown until his conviction was overturned in 2001. Woodfox remains in extended lockdown and has been there continuously except for a three year period when he was housed in the county jail.

As the magistrate judge explained:

> Extended lockdown is the effective equivalent of solitary confinement. Prisoners in extended lockdown remain alone in a cell approximately 55 to 60 square feet in size of [sic] 23 hours each day. One hour each day, the prisoner may shower and walk along the tier on which his cell is located. Three times a week, weather permitting, the prisoner may use this hour to exercise alone in a fenced yard. Additional restrictions are placed on generally available inmate privileges including those pertaining to personal property, reading materials, access to legal resources, work and contact visitation.
>
> In contrast, inmates in the general prison population live in a dormitory setting where they can interact with one another. They have educational opportunities, training and other privileges that are not available to inmates in extended lockdown.

The inmates in extended lockdown appear before the Lockdown Review Board ("Board") every 90 days. The inmates allege that they received only "sham" reviews before the Board. The inmates insist that the Board members discussed immaterial matters such as hunting and fishing rather than the inmates' cases. The inmates alleged that when they attempted to discuss the merits of their cases, a Board member told them that the Board hearing is not the place to litigate. The inmates also alleged that the Board members told them that they must

remain in extended lockdown due to the "nature of original reason for lockdown."

The inmates originally filed this suit pursuant to 42 U.S.C. § 1983 against the prison officials in a Louisiana state district court. The prison officials removed the suit to federal district court. Stalder, Cain and Norris promptly filed a Motion to Dismiss and asserted qualified immunity.[1] After being released from prison, Wilkerson filed an unopposed motion to dismiss his claims for injunctive relief.

The prison officials' motion was submitted to a magistrate judge. In her report, the magistrate judge recommended that Defendants' Motion to Dismiss be denied.[2]

The prison officials filed a timely Objection to the Magistrate Judge's Report, but the district court issued a ruling adopting the Magistrate Judge's Report as the court's opinion. The district court agreed with the magistrate judge's analysis and denied the prison officials' Motion to Dismiss on grounds of qualified immunity. Applying *Sandin v. Conner*, 515 U.S. 472 (1995), the district court concluded that the confinement in extended lockdown for the long duration experienced by these prisoners presented an "atypical and significant hardship" and "extraordinary circumstances" such that the pleadings

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[1] The prison officials did not move to dismiss the inmates' Eighth Amendment claim, so that claim remains in the trial court.

[2] The magistrate judge recommended (and the district court accepted that recommendation) that the suit against the Secretary of Corrections be dismissed because of his lack of direct involvement in providing process to the inmates.

established that a liberty interest was implicated. The district court also concluded that no reasonable officer could believe that such confinement for an extended period of time approaching three decades was not atypical under Supreme Court and Fifth Circuit standards. The prison officials filed a timely notice of appeal.

## III.

We have jurisdiction to review the district court's denial of the prison officials' Rule 12(b)(6) motion under the collateral order doctrine. *See Morin v. Caire,* 77 F.3d 116, 119 (5th Cir. 1996). We review the district court's refusal to dismiss the inmates' Fourteenth Amendment claim on the basis of qualified immunity *de novo. See Morin v. Caire,* 77 F.3d 116, 120 (5th Cir. 1996). *Id.* at 120.

## IV.

In their appeal, the prison officials ask us to reverse the portion of the district court's ruling that denies them qualified immunity on the inmates' federal due process claim, state due process claim, and claim for punitive damages. The only issue that requires discussion is the inmates' Fourteenth Amendment due process claim.[3]

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[3] The inmates' state due process claim follows the federal due process claim. The district court chose to defer ruling on the prison officials' claim that the Prison Litigation Reform Act bars the inmates' claim for punitive damages until such time as liability is found. Therefore, this issue is not properly before the court on appeal. 28 U.S.C. § 1291.

A.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The court must engage in a two-step analysis to determine whether an official is entitled to qualified immunity. First, the court must determine whether the plaintiff's allegations make out a violation of a clearly established constitutional right. If such a right is shown, the court must determine if the right was clearly established at the time of the events in question. *Saucier v. Katz,* 533 U.S. 194, 201 (2001).

B.

The inmates argue that the district court correctly applied *Sandin v. Conner,* 515 U.S. 472 (1995), to the facts in this case. In *Sandin,* the Supreme Court held that no state-created liberty interest was implicated when an inmate was placed in administrative segregation for thirty days for disciplinary reasons. The Court explained:

> Following *Wolff,* we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the

> inmate in relation to the ordinary incidents of prison life.

*Id.* at 483-84.

The district court concluded that the State had imposed "atypical and significant hardship" on these inmates sufficient to implicate a liberty interest. The prison officials' 12(b)(6) motion was, of course, presented to the district court without contextual facts concerning the reasons the inmates were initially confined to extended lockdown or why they remained confined in extended lockdown for such an inordinate period of time. At argument, counsel informed us that Wallace and Woodfox were placed in extended lockdown after being convicted in state court of killing a prison guard. Wilkerson was placed in extended lockdown after being convicted in state court of killing a fellow inmate, and he was released from Angola after his conviction was overturned in 2001. Assuming counsel's uncontradicted statement at oral argument is true, we surmise that the three inmates, following their convictions, were likely classified as maximum custody inmates under the Louisiana Department of Public Safety and Corrections regulations.[4] Louisiana Dep't of Public

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[4] "Maximum Custody" is defined as:

> Assignment of an inmate to a cell based upon the need to protect the inmate, other inmates, the public, staff or the institution. This includes temporary assignment to Administrative Segregation or permanent assignment to Disciplinary Detention/Extended Lockdown and Working Cellblock and may include Protective Custody/Extended Lockdown.

Louisiana Dep't of Public Safety and Corrections, Inmate Classification, Sentencing, and Service Functions, § 5(C)(3) (June 1998).

(Continued on following page)

Safety and Corrections, Inmate Classification, Sentencing, and Service Functions, § 5(C)(3) (June 1998).

In resolving the nature of the liberty interest and the process that is due for confinement of prisoners in extended lockdown under these circumstances, it is crucial to know whether, based on their crimes of conviction, the inmates' confinement is the result of an initial classification by prison officials as opposed to confinement for violations of less serious prison disciplinary rules. Generally, courts are not concerned with a prisoner's initial classification level based on his criminal history before his incarceration. This circuit has continued to hold post-*Sandin* that an inmate has no protectable liberty interest in his classification. *See Harper v. Showers,* 174 F.3d 716, 719 (5th Cir. 1999); *Whitley v. Hunt,* 158 F.3d 882, 889 (5th Cir. 1998); *Woods v. Edwards,* 51 F.3d 577, 581-82 (5th Cir. 1995) (citing *Wilkerson v. Maggio,* 703 F.2d 909, 911 (5th Cir. 1983)) ("Classification of inmates in Louisiana is a duty of the Louisiana Department of Corrections and an inmate has no right to a particular classification under state law."). "Classification of prisoners is a matter left to the discretion of prison officials." *McCord v. Maggio,* 910 F.2d 1248, 1250 (5th Cir. 1990) (citing *Wilkerson v. Maggio, supra*). "[I]t is well settled that '[p]rison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status'" *Id.*

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The Louisiana Department of Public Safety and Corrections has developed a set of regulations to address "Inmate Classification, Sentencing, and Service Functions" and an entirely different set of regulations to address "Disciplinary Rules and Procedures for Adult Inmates."

"Prison officials should be accorded the widest possible deference in the application of policies and practices designed to maintain security and preserve internal order." *Id.* at 1251 (citing *Bell v. Wolfish,* 441 U.S. 520, 547 (1979)).

Thus, if the inmates' confinement in extended lock-down is not the result of their initial classification, the *Sandin* test would be triggered. In *Sandin,* the prisoner, Conner, directed angry and foul language at a prison guard during a strip search. As a result, he was placed in disciplinary segregation for thirty days as punishment for violating prison disciplinary rules. Conner argued that he had a state-created liberty interest in remaining free from segregation. The Court held that Conner's confinement in disciplinary segregation for thirty days "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." *Sandin* at 486. Although the action taken by the prison officials was punitive, it did not "present a dramatic departure from the basic conditions of Conner's indeterminate sentence." *Id.* The Court noted that the conditions imposed on Conner were essentially the same as those imposed on inmates in administrative segregation and protective custody. "Thus, Conner's confinement did not exceed, similar, but totally discretionary, confinement in either duration or degree of restriction." *Id.* Other circuits have applied the *Sandin* test to inmates placed in administrative segregation for violations of prison disciplinary rules. *Wagner v. Hanks,* 128 F.3d 1173 (7th Cir. 1997); *Colon v. Howard,* 215 F.3d 227 (2nd Cir. 2000); *Hatch v. District of Columbia,* 184 F.3d 846 (1999); *Griffin v. Vaughn,* 112 F.3d 703 (1997).

If, on remand, the district court determines that the *Sandin* test is triggered, the district court must determine the appropriate baseline against which to measure the inmates' confinement in reviewing whether the inmates' confinement is "atypical." *See Hatch v. Columbia, supra; Wagner v. Hanks, supra.*

Because the inmates' Complaint does not allege whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules, we cannot determine whether the inmates have asserted facts that would give rise to denial of a liberty interest. We therefore AFFIRM the district court's Order denying the prison officials' Motion to Dismiss the inmates' procedural due process claims based on qualified immunity.

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ROBERT KING WILKERSON, ET AL

CIVIL ACTION

VERSUS

NO. 00-304-C

RICHARD STALDER, ET AL

**RULING**

(Filed Apr. 22, 2002)

The court has carefully considered the petition, the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Docia L. Dalby dated March 28, 2002. Defendants have filed an objection which the court has considered.

The court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein.

Accordingly, the motions to dismiss filed on behalf of defendants (rec. doc.nos. 4 & 24) are GRANTED IN PART and DENIED IN PART, with the procedural due process monetary claim against Secretary Stalder being dismissed but with all other still-pending claims and request for relief remaining before the court.

Baton Rouge, Louisiana, April 22, 2002.

/s/ Ralph E. Tyson
RALPH E. TYSON
UNITED STATES
DISTRICT JUDGE

RET
NL
DLD Milliner
JS Castaing
DAC
GP

**UNITED STATES DISTRICT COURT**

**MIDDLE DISTRICT OF LOUISIANA**

**ROBERT KING WILKERSON, ET AL.**

**CIVIL ACTION**

**VERSUS**

**NO. 00-304-C-M3**

**RICHARD STALDER, ET AL.**

**NOTICE**

(Filed Mar. 28, 2002)

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Baton Rouge, Louisiana, this 28th day of March, 2002.

/s/ Docia L. Dalby
MAGISTRATE JUDGE
DOCIA L. DALBY

NL Quigley
DLD Schulberg
JS Castaing
DAC
GP

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF LOUISIANA**

**ROBERT KING WILKERSON, ET AL.**

**CIVIL ACTION**

**VERSUS**

**NO. 00-304-C-M3**

**RICHARD STALDER, ET AL.**

## MAGISTRATE JUDGE'S REPORT

(Filed Mar. 28, 2002)

This prison Section 1983 case comes before the Court on defendants' motions (rec.doc.nos. 4 and 24) to dismiss under Rule 12(b)(6). The plaintiffs allege in principal part that they have been kept in extended lockdown – in essence solitary confinement – for periods approaching thirty years with only meaningless "sham" hearings on the issue of their continued confinement. They claim that this extended solitary confinement violates the Eighth Amendment, and they further claim that the continued confinement without a meaningful hearing violates the procedural due process component of the Due Process Clause. The main issue presented on the motions is whether the defendants are entitled to dismissal of the procedural due process claim for monetary relief on the basis of qualified immunity because there allegedly is and was no clearly established protected "liberty interest" in being free from solitary confinement for nearly thirty years.

### *Background*

The following facts and allegations must be accepted as true for purposes of the present Rule 12(b)(6) motions.

Plaintiffs Herman Wallace, Robert King Wilkerson and Albert Woodfox were first placed in extended lockdown at the Louisiana State Penitentiary at Angola, Louisiana, in 1972. Wallace has remained in extended lockdown continuously since that time. Wilkerson remained in extended lockdown continuously from 1972 until early 2001 when his conviction was overturned and he was fully released from state custody. And Woodfox has spent all of the time that he has been at Angola since 1972 in extended lockdown. The only time he was not in extended lockdown was during the three year period when he was incarcerated in a parish jail. Thus, during the time period pertinent to these motions, March 1999 to March 2000, Wallace and Wilkerson had been in extended lockdown for approximately 28 years; and Woodfox had been in extended lockdown for 25 of those 28 years.

Extended lockdown is the effective equivalent of solitary confinement. Prisoners in extended lockdown remain alone in a cell approximately 55 to 60 square feet in size for 23 hours each day. One hour each day, the prisoner may shower and walk along the tier on which his cell is located. Three times a week, weather permitting, the prisoner may use this hour to exercise alone in a fenced exercise yard. Additional restrictions are placed on generally available inmate privileges including those pertaining to personal property, reading materials, access to legal resources, work, and contact visitation.

In contrast, inmates in the general prison population live in a dormitory setting where they can interact with one another. They have educational opportunities, training and other privileges that are not available to inmates in extended lockdown.

At 90 day intervals, a body called the Lockdown Review Board considers plaintiffs' continued confinement in extended lockdown. Plaintiffs allege that this quarterly proceeding is a sham proceeding in which no meaningful review actually takes place. They maintain that board members discuss unrelated matters such as hunting and fishing rather than the inmate's case. Plaintiffs assert that if the inmate tries to discuss why he should be released from extended lockdown, board members tell him: "We're not here to litigate; litigate somewhere else." After each review, the board continues the plaintiffs' maximum security classification due to "nature of original reason for lockdown"; and no meaningful attempt is made to determine whether plaintiffs are fit for a less restricted environment. This pattern has persisted for the entire period of approximately 28 years.

Plaintiffs names as defendants: (1) four prison officials who have served as members of the Lockdown Review Board (R. Rachal, Randy Ritchie, Sam Smith and Paul Myers); (2) Richard Peabody, the deputy warden in charge of security; (3) Warden Burl Cain; and (4) Richard Stalder, the Secretary of the Louisiana Department of Public Safety and Corrections.

With respect to personal involvement and causal connection, the Lockdown Review Board members obviously were directly involved in the decision to continue the extended lockdown. Plaintiffs allege that Richard Peabody influenced or participated in the decisions of the board to refuse to release plaintiffs. They maintain that Warden Cain knows of their 28-year confinement in extended lockdown, and he further knows that the board will not release them from extended lockdown without direction from above. Plaintiffs further allege that Warden Cain told

a person outside the prison in mid-October of 2000 that the plaintiffs – publicly known as the "Angola Three" – would not be released from extended lockdown because they had not reformed their political beliefs. Finally, plaintiffs allege that Secretary Stalder knows of the plaintiffs' long term confinement in extended lockdown, and he has refused to take any action to change the situation. Plaintiffs base this allegation of Secretary Stalder's knowledge on the high-profile nature of their case, previous litigation, and Stalder's consideration of plaintiff Woodfox's third-step grievance.

In their complaint, as amended, plaintiffs claim that their long duration solitary confinement violates the Eighth Amendment's guarantee against cruel and unusual punishment. They further claim that the sham review of their extended confinement violates the procedural protections of the Due Process Clause. They base their claims on decisions to continue their extended lockdown occurring on and after March 30, 1999. They seek compensatory damages, punitive damages, and declaratory and injunctive relief.

In the pending motions to dismiss the original and amended complaints, defendants in principal part seek dismissal of the procedural due process monetary claim on the basis of qualified immunity.[1] Defendants contend that the law does not and did not clearly establish that the

[1] A number of collateral issues have been mooted over the course of the briefing. The remaining collateral issues that have not been mooted are addressed briefly in the final section of this report.

"liberty interest" required for such a claim arises on the facts alleged.

***Governing Law***

A court presented with a claim of qualified immunity first must consider this threshold question:

> Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?

*Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2155-56, 150 L.Ed.2d 272 (2001); *Branton v. City of Dallas*, 272 F.3d 730, 744 (5th Cir. 2001).

If the plaintiff's allegations make out a violation of a constitutional right, the court then must consider whether the law clearly established that the defendant's conduct was unlawful in the circumstances of the case. In order to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is, the court must ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier*, 121 S.Ct. at 2156-57; *Branton*, 272 F.3d at 744.

The first question – that of whether the facts alleged show the violation of a constitutional right – is determined according to the law existing at the time of the court's decision. *E.g.*, *Jacobs v. West Feliciana Sheriff's Department*, 228 F.3d 388, 393 (5th Cir. 2000). The second question – that of whether the law clearly established that the conduct was unconstitutional – is determined under

the law available at the time of the conduct. *E.g.*, *Chiu v. Plano Independent School District*, 260 F.3d 330, 343 & n.7 (5th Cir. 2001). However, on the second question, there does not have to be commanding precedent that is factually on all fours or that holds that the very action in question was unlawful. *Chiu*, 260 F.3d at 343 n.7.[2] Rather, the right in question must be based on pre-existing law; and the unlawfulness of the conduct in question must be sufficiently clear that a reasonable official would understand that what he was doing violated the right. *See Chiu*, 260 F.3d at 343 & n.7. The law requires that immunity be denied to officials who transgress rights of which a reasonable person would have known. *Chiu*, 260 F.3d at 354 n.32.

Generally, the court looks to Supreme Court and Fifth Circuit law to determine whether the applicable law was

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[2] The Fifth Circuit has reaffirmed this principle *en banc*. *See Doe v. Taylor Independent School District*, 15 F.3d 443, 454-55 (5th Cir. (*en banc*) *cert.denied*, 513 U.S. 815, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994). The *en banc* court stated the principle in the text; and the court then elaborated: "Phrased another way, officials must observe 'general, well-developed legal principles.'" *Doe*, 15 F.3d at 455, *quoting*, *Jefferson v. Ysleta Ind. School Dist.*, 817 F.2d 303, 305 (5th Cir. 1987). *Accord Morris v. Dearborne*, 181 F.3d 657, 665-66 & 672 (5th Cir. 1999); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445-47 (5th Cir. 1998).

Defendants rely on *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997), for the contrary proposition that there must be a previous case with "materially similar" facts. *Pierce*, however, relied upon an *en banc* decision from the Eleventh rather than the Fifth Circuit for this proposition. The earlier, and in this instance *en banc*, Fifth Circuit authority in *Doe v. Taylor Independent School District* indisputably controls in the presence of a conflict. *See, e.g.*, *Ali v. Johnson*, 259 F.3d 317, 318 (5th Cir. 2001) (the earlier line of Fifth Circuit authority controls).

clearly established at the time of the constitutional violation. The court is not limited to looking only at those decisions to make this determination, however. While the Fifth Circuit has stated that intra-Circuit and Supreme Court cases "loom largest" in the qualified immunity inquiry, it has held that relying exclusively on those authorities would be "excessively formalistic." The Fifth Circuit thus has declined to "rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue." Instead, "a court necessarily must exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions." *Melear v. Spears*, 862 F.2d 1177, 1184 n.8 (5th Cir. 1989).[3]

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[3] Defendants suggest that *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995), bars consideration of extra-Circuit authority. However, defendants' reliance on *Brady* is misplaced for three reasons.

First, rehearing *en banc* was granted in *Brady*; and the appeal later was dismissed without being heard by the *en banc* court. *See Brady*, 58 F.3d at 176; *Brady v. Fort Bend County*, 145 F.3d 691, 697 (5th Cir. 1998) (later appeal). The grant of *en banc* rehearing automatically vacates the panel opinion and deprives it of precedential value, even where the appeal later is dismissed without *en banc* consideration. *E.g.*, *Asociacion Nacional de Pescadores v. Dow*, 988 F.2d 559, 564-565 (5th Cir. 1993); *United States v. Shannon*, 981 F.2d 759, 763 (5th Cir. 1993). *Brady* thus has "no current precedential value." 981 F.2d at 763.

Second, both *Brady* and the earlier *Boddie* decision upon which it relies state only that an official cannot rely on extra-Circuit law to claim that the law is not "clearly established" when binding Fifth Circuit caselaw already "clearly establishes" that his conduct was

(Continued on following page)

***Discussion***

The Fourteenth Amendment prohibits any State from depriving a person of life, liberty or property without due process of law. In the context presented in this case, a prisoner thus must show that he was deprived of a "liberty interest" as a fundamental prerequisite to any procedural due process claim. *E.g.*, *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). *See also Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (outlining the procedural protections then required).

In principal part, the defendants seek to establish that the law did not and does not clearly establish that the plaintiffs had a constitutionally protected liberty interest in being free from solitary confinement for a 28 year period. Against this backdrop, the Court emphasizes what the principal thrust of the motions and the Court's ruling thereon do *not* concern. No question is raised on these

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unlawful. *See Brady*, 58 F.3d at 175; *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 748 (5th Cir. 1993). The cases thus stand for the unremarkable proposition that Fifth Circuit law clearly establishing a violation is binding within this Circuit even if other courts outside the Circuit might reach a contrary conclusion. As reflected in *Boddie*, the "clearly established" inquiry truly does come to an end if Fifth Circuit law clearly establishes a constitutional violation. Nothing in either *Brady* or *Boddie* conflicts with the prior Fifth Circuit rule in *Melear* that a court can look outside the Circuit to case law that is not inconsistent with Fifth Circuit law in determining whether a right is "clearly established."

Finally, to the extent, if at all, that the rule stated in *Boddie* conflicts with *Melear*, the earlier line of authority – that found in *Melear* – controls. *E.g.*, *Ali v. Johnson*, *supra*. This Court thus is not precluded from looking outside the Fifth Circuit on the qualified immunity inquiry. *Melear*, 862 F.2d at 1184 n.8.

motions as to whether, if a liberty interest arises, the allegations of "sham" hearings state a violation of clearly established procedural due process rights. No argument is raised at this juncture that qualified immunity bars all relief on the Eighth Amendment claim. And the arguments advanced on these motions do not concern any First Amendment claim implicated by the pleadings. Rather, putting the collateral issues addressed at the end of this decision to one side, the main issue raised is whether, under clearly established law, the facts alleged gave rise to the liberty interest required for the procedural due process claim and only that claim. No other claim is affected by the liberty interest argument.[4]

Accordingly, under *Saucier* and Fifth Circuit precedent, the Court is presented with two questions on the main argument raised:

(1) Do 25 to 28 years of solitary confinement give rise to the predicate liberty interest required for the procedural due process claim?

(2) If so, was that liberty interest "clearly established" under the law at the time of the conduct in question, such that it would be apparent to a reasonable official that a liberty interest in fact was implicated?

The Court proceeds to these focused and discrete issues.

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[4] *Accord Sandin v. Conner*, 515 U.S. 472, 487 n.11, 115 S.Ct. 2293, 2302 n.11, 132 L.Ed.2d 418 (1995) (absence of a liberty interest does not preclude claims under the First and Eighth Amendments); *Allah v. Seiverling*, 229 F.3d 220 (3rd Cir. 2000) (the liberty interest analysis did not affect the prisoner's First Amendment claim that he was kept in administrative segregation in retaliation for filing civil rights suits).

### *Do Nearly Thirty Years of Solitary Confinement Give Rise to a Liberty Interest?*

The Supreme Court's 1995 decision in *Sandin v. Conner* establishes the standard that applies to this case for determining whether the nearly three decades long solitary confinement of plaintiffs give rise to a liberty interest.[5] In *Sandin*, the prisoner was placed in disciplinary solitary confinement for a 30 day period. This 30 day disciplinary confinement occurred within the context of an indeterminate sentence of 30 years to life, and the prisoner was serving the sentence at a maximum security facility. While the prisoner apparently was in lockdown for 23 hours a day, the general inmate population at the facility was in lockdown for 12 to 16 hours a day. Further, inmates also were placed in the same special holding unit for administrative reasons, and they apparently were subject to substantially the same restrictions as those imposed on the plaintiff. *See* 515 U.S. at 475-76 n.2 & 486 n.8, 115 S.Ct. at 2296 n.2 & 2301 n.8.

In a 5-4 decision, the Supreme Court held in *Sandin* that the 30 day confinement did not give rise to a liberty interest for purposes of procedural due process protection. The Court set forth the following governing standard:

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[5] 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). The inquiry on this first part of the qualified immunity analysis looks to the law at the time of this decision. The Court nonetheless identifies the dates of the relevant decisions in the text of this first section for easy reference back on the second part of the analysis, *i.e.*, that regarding whether any liberty interest that arises on these facts was clearly established at the time of the conduct in question, from March 1999 to March 2000.

> Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. . . . But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

515 U.S. at 483-84, 115 S.Ct. at 2300 (citations omitted).

In determining whether the particular confinement in *Sandin* gave rise to a liberty interest, the Court conducted two separate inquiries. First, the Court looked to whether the disciplinary confinement exceeded "similar, but totally discretionary, confinement in *either duration or* degree of restriction." 515 U.S. at 486, 115 S.Ct. at 2301 (emphasis added). It concluded that "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment." *Id.* Second, the Court looked separately to whether placing the inmate in 30 day disciplinary segregation "will inevitably affect the duration of his sentence." 515 U.S. at 487, 115 S.Ct. at 2302. After reviewing relevant state law governing eligibility for parole, the Court concluded that it would not. *Id.*

*Sandin* thus established in 1995 that a restriction that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" gives rise to a liberty interest. *Sandin* further established that the duration of the solitary confinement was a factor to be considered under this standard.

Defendants rely upon two post-*Sandin* Fifth Circuit decisions[6] in support of their position that over a quarter century of extended lockdown does not give rise to a liberty interest. They rely first on *dicta* in *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), remarking that, after *Sandin*, "it is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status." 65 F.3d at 31-32. The *Orellana* panel further commented that "[i]t is unlikely . . . that administrative segregation can give rise to any unconstitutional claim after *Sandin*." 65 F.3d at 32 n.1. Defendants also rely on the statement in *Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997), that "[p]risoners have no liberty interest in avoiding disciplinary segregation, at least where the status does not 'inevitably affect the duration of the sentence.'" 112 F.3d at 821 (quoting *Sandin*).

Neither *Orellana* nor *Carson* have any significant bearing on this case, however. In both decisions, the inmate premised the liberty interest upon an alleged effect on parole eligibility rather than upon any claim that either the duration or degree of a solitary confinement itself gave rise to a liberty interest.[7] Both *Orellana* and *Carson* thus

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[6] The Fifth Circuit had held under pre-*Sandin* Supreme Court authority that the relevant Louisiana regulations gave rise to a liberty interest in not being confined in extended lockdown. *E.g.*, *McRae v. Hankins*, 720 F.2d 863, 867 (5th Cir. 1983).

[7] Indeed, the *Orellana* opinion does not in any respect reflect that the inmate was even *in* either disciplinary or administrative segregation. Rather, the inmate in that case claimed that *a change in Texas parole review procedures* violated due process. Thus, to the extent that

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looked to the portion of the *Sandin* analysis that considered whether the claimed effect on parole eligibility would "inevitably affect the duration of the sentence." The Fifth Circuit had no occasion in either case to look to the portion of the *Sandin* analysis that considered whether the conditions of the solitary confinement atypically exceeded the ordinary incidents of prison life "in either duration or degree." The statements in *Orellana* and *Carson* clearly did not eliminate this aspect of *Sandin* from the governing analysis for a case actually involving a liberty interest based upon the duration or degree of segregation rather than upon only a claimed effect on parole eligibility.

Rather, the Fifth Circuit's pre-*Carson* decision in *Pichardo v. Kinker*, 73 F.3d 612 (5th Cir. 1996), has more of a bearing upon this case. In *Pichardo*, the inmate did claim that his continued confinement in administrative segregation deprived him of a liberty interest. In addressing this claim, the Fifth Circuit specifically distinguished a prior decision that had concerned only a collateral consequence from segregation (accrual of good-time credits) rather than the placement in segregation itself. 73 F.3d at 613. On the distinct claim concerning the placement in

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the comments in *Orellana* – which do not themselves categorically rule out a liberty interest in segregation cases – pertain to the segregation issue, they constitute only *dicta* and qualified *dicta* at that. The Fifth Circuit's *holding* in *Orellana* was only that the Texas parole statutes did not confer a liberty interest. 65 F.3d at 32. In *Carson*, the Texas inmate based his liberty interest claim on the premise that being placed in administrative segregation rendered him ineligible for parole. *See* 112 F.3d at 820-21. He made no claim that either the conditions or duration (which was not quantified in the opinion) of the confinement gave rise to a liberty interest.

segregation, the Fifth Circuit invoked the more apposite "atypical and significant hardship" portion of the *Sandin* analysis rather than the "inevitably affect the duration of sentence" portion of *Sandin* that the court previously had invoked in *Orellana* and *Carson* concerning the effect of the state's action on parole eligibility. *Id.* Against that backdrop, the court held:

> We hold that absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will never be a ground for a constitutional claim. . . .

73 F.3d at 612. No argument was advanced in *Pichardo* that the duration of the segregation, which is not mentioned in the opinion, presented an extraordinary circumstance; and the court accordingly affirmed the decision denying relief.

Taken together, the 1995 Supreme Court decision in *Sandin* and the 1996 Fifth Circuit decision in *Pichardo* established that a disciplinary or administrative solitary confinement will give rise to a liberty interest only in the most exceptional of cases. However, the decisions further established that a liberty interest will be created where the segregation imposes, "in either duration or degree of restriction," an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life" or, as the Fifth Circuit phrased it in *Pichardo*, in "extraordinary circumstances."

The Court would think it self-evident that 25 to 28 years of solitary confinement presents an atypical and significant hardship and a most extraordinary circumstance.[8] Defendants suggest to the contrary, however; and the Court thus will look to law outside the Fifth Circuit to see whether such an extreme position finds support in other reported federal decisions.

Outside the Fifth Circuit, post-*Sandin* decisions disagree as to whether durations substantially shorter than those involved in this case trigger a liberty interest under *Sandin*.[9] On one side of the slate, three circuits have held or suggested that a period of a year or even less could trigger a liberty interest. The Eleventh Circuit assumed *arguendo* in a 1996 decision that one year of punitive

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[8] *Cf. Orellana*, 65 F.3d at 32 ("Few other incidents of prison life involve such a level of deprivation as disciplinary segregation."). *See also McClary v. Kelly*, 4 F.Supp.2d 195, 205-09 (W.D.N.Y. 1998) (after canvassing expert testimony and other authorities, the district court observed that, even without these sources, "[a] conclusion . . . that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science.").

[9] In the main, the Court is speaking in the text within the context of confinements that are similar in *type* to those presented here with regard to the conditions and level of restrictions imposed, *e.g.*, being restricted to solitary confinement in a relatively small cell for 23 hours each day. The Court's discussion in the text focuses on duration because that is the overarching and quite extraordinary feature presented by the facts of this case, but the Court does not thereby overlook the importance the type and level of restrictions imposed. The cases discussed in the text for the most part concern restrictions that are comparable to those involved in this case, such that the duration of those restrictions thus becomes the salient point of comparison between the cases.

solitary confinement triggers due process protection.[10] A 1999 D.C. Circuit decision remanded for further factual development in a case involving only 29 weeks of "adjustment" administrative segregation.[11] And a 2000 Second Circuit decision established within that circuit that while 101 days of punitive solitary confinement does not trigger due process protection, 305 days does.[12]

On the other side of the slate, decisions from three other Circuits suggest that a year-long confinement may not trigger due process protection and further that a liberty interest may not be invoked by as much as 2-½ to 3 years of confinement. The Seventh Circuit remanded for further factual development in a 1997 decision involving one year of disciplinary confinement, but it did so only

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[10] *Williams v. Fountain,* 77 F.3d 372, 374 n.3 (11th Cir. 1996).

[11] *Hatch v. District of Columbia,* 184 F.3d 846 (D.C. Cir. 1999). The D.C. Circuit remanded for further factual development regarding a comparison of the conditions of the segregation to other confinements at the prison, the duration of the plaintiff's confinement to that of other prisoners, and the length of his segregation confinement to his overall sentence. The determination of whether the segregation was of sufficient duration to implicate a liberty interest was left to the district court on remand. *See* 184 F.3d 846. Of course, a decision such as *Hatch* remanding for further factual inquiry on the merits of the liberty interest issue does not establish that the duration in question actually triggers a liberty interest, only that it could.

[12] *Colon v. Howard,* 215 F.3d 227, 231-32 (2nd Cir. 2000). In *Colon* and all of the other New York cases cited herein – including those involving administrative rather than disciplinary confinement – the prisoners were placed in the Special Housing Unit or "SHU". Prisoners in SHU were placed in a solitary confinement cell for 23 hours a day, permitted to exercise in the prison yard for only one hour a day, and limited in shower, work, schooling, reading, visitation and other privileges ordinarily allowed to the general prison population. *See* 215 F.3d at 230.

after an extended discussion in which it found it "extremely unlikely" that the plaintiff would be able to make out a claim.[13] The Third Circuit held in 1997 that 15 months of administrative segregation pending a misconduct investigation does not give rise to a liberty interest.[14] And the Sixth Circuit held in decisions in and after 1998 that periods of nondisciplinary administrative segregation as long as 2-½ to 3 years does not trigger a liberty interest.[15]

The decisions outside the Fifth Circuit thus do not provide conclusive guidance with regard to whether a

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[13] *Wagner v. Hanks,* 128 F.3d 1173 (7th Cir. 1997); *but cf. Bryan v. Duckworth*, 88 F.3d 431, 433 (7th Cir. 1996) (one year "might count" as a deprivation of liberty if the conditions of segregation were considerably harsher than ordinary incidents of prison life).

[14] *Griffin v. Vaughn*, 112 F.3d 703, 706-07 (3rd Cir. 1997).

[15] *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998) (one judge concurring in the result on other grounds). Jones involved a nondisciplinary administrative segregation for investigation, and the restrictions imposed and their duration were not necessarily markedly different from those imposed on inmates in segregation at the facility for other reasons. *See also Randolph v. Campbell,* 2001 WL 1580227 (6th Cir. 2001) (unpublished) (the Sixth Circuit held that an administrative segregation of indefinite duration that had lasted 3 years by the time of the appeal decision did not invoke a liberty interest); *Bonner v. Parke,* 918 F.Supp. 1264, 1269-70 & n.4 (N.D. Ind. 1996) (the district court within the Seventh Circuit found that a three year disciplinary confinement that was "not significantly more onerous" than general prison population conditions did not implicate a liberty interest; but the issues were "very close indeed," and the court acknowledged that an upper boundary existed in applying *Sandin*). *But cf. Brodie v. Kuhlman*, 1997 WL 335657, at *2 n.1 (W.D.N.Y. 1997) ("beyond cavil" that three years SHU confinement constitutes an "atypical and significant" hardship under *Sandin*).

relatively short (in relation to this case) confinement of one to three years triggers a liberty interest.

Out beyond three years, however, there has not been any debate among any published decisions found by or cited to this Court. Prior to the Second Circuit's decision holding that 305 days of solitary confinement triggered a liberty interest, a district court within that circuit held in 1998 that an administrative solitary confinement exceeding four years implicates the Due Process Clause.[16] And the Third Circuit held in a 2000 decision that eight years of administrative segregation gives rise to a protected liberty interest.[17] Significantly, testimony from prison officials in these cases established that such long duration confinements were extremely rare at their institutions.[18] It

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[16] *McClary v. Kelly*, 4 F.Supp.2d 195 (W.D.N.Y. 1998).

[17] *Shoats v. Horn*, 213 F.3d 140 (3rd Cir. 2000). Further, the Eighth and Sixth Circuits have held or suggested in unpublished decisions that administrative confinements exceeding 10 years are atypical. *See Herron v. Wright*, 116 F.3d 480, 1997 WL 292333 (8th Cir. 1997) (unpublished) (the Eighth Circuit held that the district court erred in summarily dismissing a claim that 10 years of restrictive administrative segregation raised a liberty interest); *Herron v. Wright*, 11 Fed.Appx. 659, 2001 WL 360479 (8th Cir.), *cert. denied*, ___ U.S. ___, 122 S.Ct. 653, 151 L.Ed.2d 569 (2001) (on an appeal after remand in the same case, the Eighth Circuit affirmed the district court's decision that a 13 year confinement gave rise to a liberty interest); *Rodgers v. Johnson*, 221 F.3d 1335, 2000 WL 875767 (6th Cir. 2000) (reversing a Rule 12(b)(6) dismissal because, *inter alia*, the prisoner's "continued placement in segregation for over 10 years appears to be beyond typical and insignificant").

[18] In *Shoats*, which involved an 8 year confinement, the special assistant to the corrections commissioner had never witnessed another example of such a permanent solitary confinement in his 22 years with the Pennsylvania Department of Corrections. He described the confinement not merely as atypical but instead as "unique." *See* 213 F.3d

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thus would appear likely that the relative paucity of reported cases involving durations exceeding four years may well be precisely because such long duration confinements are extraordinarily rare in penal systems across the country.

The Court has no difficulty holding – based solely upon Supreme Court and Fifth Circuit authority – that a liberty interest is implicated by 25 to 28 years of solitary confinement in the circumstances alleged in this case. Additionally, however, review of law from outside the Fifth Circuit likewise confirms that solitary confinement of such unusually long duration clearly presents an "atypical and significant hardship" and "extraordinary circumstances." The Court accordingly holds that the first prong of the qualified immunity analysis is satisfied on the allegations made.

***Was the Liberty Interest "Clearly Established" at the Time of the Conduct?***

On the second prong of the qualified immunity analysis, the Court must determine whether this liberty interest was "clearly established" under the law at the time of the conduct in question, such that it would be apparent to a reasonable official that a liberty interest in fact was implicated in the circumstances presented.

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at 144. In *McClary*, only 15 of 4,604 inmates had been sentenced to over 3 years disciplinary confinement in SHU; and, of the three prison officials that testified, only one could recall an instance where a prisoner had been in administrative segregation for such an extended period.

If this case involved solitary confinements of only one, two, or even three years duration, defendants' entitlement to qualified immunity might be a foregone conclusion. During the relevant 1999-2000 time period, Supreme Court and Fifth Circuit law established that a solitary confinement would give rise to a liberty interest in only atypical or extraordinary circumstances. An objectively reasonable officer arguably could conclude based upon these holdings – particularly with the then-existing split in authority in other lower federal courts concerning confinements of up to three years length – that such relatively short duration solitary confinements did not give rise to a liberty interest.

But this case is far beyond that pale, nearly *ten times* longer. No objectively reasonable officer could believe in the circumstances alleged that a solitary confinement approaching *three decades* duration was not atypical or extraordinary under the established Supreme Court and Fifth Circuit standards. Indeed, given the natural limits on the length of human life, especially one in prison, it is difficult to imagine a more atypical or extraordinary confinement than that presented in this case. No reasonable officer could conclude – even in advance of later case law[19] – that procedural protections of the Due Process Clause did not attach to such an extended solitary

[19] The only difference of note between the law at the time of this decision and that existing at the time of the conduct in question is that the Third Circuit's *Shoats* decision was issued after this suit was filed. The governing Supreme Court and Fifth Circuit standards already were established at the time of the conduct, and the inter-circuit split in authority regarding much, much shorter term confinements existed than and exists now.

confinement. The Court accordingly holds that the liberty interest was clearly established at the time of the conduct in question, in that an objectively reasonable officer could not conclude under the law in force at the time that 25 to 28 years of solitary confinement did not give rise to a liberty interest.

Defendants thus have not established an entitlement to dismissal of the procedural due process claim under Rule 12(b)(6) on the basis of qualified immunity on the grounds asserted.[20]

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[20] *Cf. Morris*, 181 F.3d at 671 (in affirming the denial of qualified immunity, the court observed that a child's three year stay in foster care did not even come close to the line that allowed a state to temporarily remove a child from her home for a few days or months); *Gutierrez*, 139 F.3d at 446-47 (an objectively reasonable officer could not believe that use of a hog-tying device that gave rise to a substantial risk of death or serious bodily injury would not violate the clearly established standard against the use of excessive force simply because there had not been a hog-tying device case previously).

The Court is not persuaded by defendants' remaining subsidiary arguments on the liberty interest issue. For example, the Court is not persuaded by the defendants' syllogism that if the plaintiffs received due process when they initially were *placed* in extended lockdown, there is no clearly established right to due process as to whether they thereafter ever should be *released* from extended lockdown. *Sandin's* inclusion of the duration of the confinement in its analysis refutes this contention. Nor is the Court persuaded by the defendants' argument that relief should be denied because plaintiffs failed to identify any Louisiana regulations giving rise to a liberty interest. Over and above the fact that *Sandin* specifically eschewed the regulation-based analysis of the earlier *Hewitt* decision, the Fifth Circuit found before *Sandin* that the pertinent Louisiana regulations *satisfied Hewitt's* regulation-based standard and gave rise to a liberty interest. *See McRae,* 720 F.2d at 867. Drawing the regulations into the analysis thus would not appear to help defendants.

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***Remaining Collateral Issues***

Many of the collateral issues have been mooted over the course of the briefing, and only a few remain for brief discussion.[21]

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Defendants filed a notice advising of the 1987 unpublished Fifth Circuit decision in *Wallace v. Phelps,* No. 86-3623 (5th Cir., Feb. 4, 1987). But, appropriately, defendants do not rely upon the decision in their arguments. The unpublished *Wallace* decision held that extended lockdown did not give rise to a liberty interest. However, most significantly, the unpublished decision predates the 1995 *Sandin* standard that governed the defendants' conduct in 1999-2000, the time period relevant to *this* case. Moreover, the Court notes in passing that the decision relied upon in *Wallace* on the liberty interest issue did not involve a procedural due process claim; and it made no holding – or even statement – regarding a liberty interest issue. *See Wilkerson v. Maggio,* 703 F.2d 909, 910-11 (5th Cir. 1983). Fifth Circuit law instead was clearly established at the time of *Wallace* that the Louisiana extended lockdown regulations gave rise to a liberty interest. *McRae,* 720 F.2d at 867.

[21] Defendants also contended initially that: (1) plaintiffs failed to exhaust administrative remedies on the Eighth Amendment claim; (2) all claims prior to March 30, 1999, were prescribed; (3) claims for denial of access to law materials were barred; and (4) the request for damages for emotional and psychological injuries was barred. On the first point (exhaustion), defendants conceded at oral argument that the applicable requirements have been satisfied. On the second point (prescription), plaintiffs clearly state that they bring no claims that arose prior to March 30, 1999. *See, e.g.,* rec.doc.no. 30, at 2. The point therefore is moot. Similarly, on the third point (access to legal materials), plaintiffs confirm that they make no separate claim for denial of access to legal materials. Rather, they make allegations of restricted access to legal materials only on their way to showing, as required, that the conditions of extended lockdown differ from conditions in the general prison population. Thus, this point is moot as well. And, on the fourth point (emotional and psychological damages), plaintiffs added allegations of physical injury; and defendants concede that these allegations moot their objection to the request for emotional and psychological damages at the pleading stage. The Court further notes that plaintiff Robert

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The Court is persuaded that the procedural due process monetary claim against Secretary Stalder should be dismissed for lack of sufficient allegations of causal connexity and individual involvement. The parties agree that a supervisory official can be found liable only if: (1) he knew facts or a pattern of inappropriate behavior by a subordinate pointing plainly toward a conclusion that the subordinate was violating the plaintiffs' constitutional rights; (2) he demonstrated deliberate indifference toward those rights by failing to take action that was obviously necessary to prevent or stop the violation; and (3) his failure caused a constitutional injury to the plaintiffs. *E.g., Alton v. Texas A&M University,* 168 F.3d 196, 200 (5th Cir. 1999). Moreover, each individual defendant's entitlement to qualified immunity must be examined separately. *Jacobs,* 228 F.3d at 395. Plaintiffs' allegations would establish that Secretary Stalder was aware of their lengthy extended lockdown, but there are no allegations tending to establish that he was aware that the lockdown board was conducting only sham hearings. The mere fact that a grievance may have reached him that included an allegation that the hearings were a sham would not establish knowledge that the allegation was true. The pleadings therefore do not establish the requisite individual connection for a due process monetary claim against Stalder.

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King Wilkerson has voluntarily dismissed his claims for declaratory and injunctive relief following upon his release from state custody. *See* rec.doc.nos. 40 & 41. Finally, the Court's rulings on the defendants' arguments regarding federal claims fully resolve their entirely parallel arguments on any parallel state law claims asserted.

The Court does not reach the same conclusion with respect to Warden Cain, however. Fairly read, the amended complaint alleges that Warden Cain was aware that the lockdown board would not release the plaintiffs without authority from higher up and that he allegedly intends to keep them in lockdown until they reform their political beliefs. The pleadings therefore allege a sufficient causal connection vis-à-vis Cain.

Defendants next contend that plaintiffs' punitive damage claims should be dismissed as barred by the Prison Litigation Reform Act (PLRA).[22] Under 18 U.S.C. § 3626(a)(1)(A), "[p]rospective relief in any civil action [involving] prison conditions shall extend no further than necessary to correct the violation of the Federal right." "Prospective relief" is defined under Section 3626(g)(7) as "all relief other than compensatory monetary damages." Defendants contend that punitive damages thus is included within the concept of "prospective relief." They maintain that an award of punitive damages would go further than necessary to correct the violation, and that such an award thus is barred in this case under the PLRA.

The defendants' argument that Congress thus curtailed punitive damages in prison cases essentially by implication necessarily raises difficult constitutional questions regarding the construction and effect of the PLRA.

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[22] Defendants actually phrase this argument and the next one in terms of qualified immunity. The question of whether the PLRA bars certain relief is not analyzed under qualified immunity principles, however. That is, the PLRA issue is decided as a matter of federal statutory construction; plaintiffs do not need to show that the manner in which the PLRA applies was or is "clearly established."

*Cf. Oliver v. Scott,* 276 F.3d 736, 747 n.20 (5th Cir. 2002). Following the Fifth Circuit's lead in *Oliver*, the Court pretermits further consideration of this issue at this early juncture in this case without prejudice to later reassertion of the argument. The issue need not be reached at all unless and until liability is found, and it potentially could be deferred until after the punitive damage issue was submitted to the trier of fact for a determination under established law. *See, e.g., Sockwell v. Phelps,* 20 F.3d 187, 192-93 (5th Cir. 1994) (standards governing punitive damage awards in Section 1983 prison cases). That is, in the final analysis, the Court need not reach defendants' argument that the PLRA curtails punitive damage relief unless and until the trier of fact finds both that defendants are liable and that punitive damages otherwise are warranted. Sound principles of judicial economy and constitutional adjudication counsel in favor of deferring the unsettled constitutional questions implicated by the defendants' argument until a juncture when the issue truly must be resolved.

In a similar vein, defendants contend that the Court, on the face of the pleadings, should apply Section 3626(a)(1) to circumscribe the injunctive and declaratory relief available in this case. Defendants maintain that the alleged constitutional violations could be remedied by additional exercise time, personal property or interaction rather than by release back into the general prison population. While it is subject to question whether the defendants' suggested remedies actually address the crux of the plaintiffs' claims, Fifth Circuit law in any event establishes that the provisions of Section 3626(a)(1) do not become a concern until the point that the Court actually orders prospective relief. *Williams v. Edwards,* 87 F.3d

126, 133 (5th Cir. 1996). That point has not been reached in this case, and defendants' argument regarding the proper scope of equitable relief thus is premature.

## RECOMMENDATION

For the foregoing reasons, the Magistrate Judge recommends that defendants' motions (rec.doc.nos. 4 and 24) to dismiss be **GRANTED IN PART** and **DENIED IN PART**, with the procedural due process monetary claim against Secretary Stalder being dismissed but with all other still-pending claims and requests for relief remaining before the Court.

Baton Rouge, Louisiana, this 28th day of March, 2002.

/s/ Docia L. Dalby
MAGISTRATE JUDGE
DOCIA L. DALBY

Supreme Court, U.S.
FILED
SEP 15 2003
OFFICE OF THE CLERK

(2)

No. 03-238

# In The Supreme Court of the United States

BURL CAIN, TOM NORRIS, RICHARD PEABODY, MAJOR R. RACHAL, COLONEL SAM SMITH and MAJOR PAUL J. MEYERS,

*Petitioners,*

v.

ROBERT KING WILKERSON, ALBERT WOODFOX, and HERMAN WALLACE,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

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## REASONS FOR DENYING THE WRIT

The prison officials state that the sole question presented by their Petition is whether the Fifth Circuit was correct in rejecting petitioners' argument that *Sandin v. Conner*[1] added an additional prong (the "atypical and significant hardship" inquiry) to the pre-existing liberty interest analysis.[2]

The Fifth Circuit's ruling does not raise the question presented by the Petition. Instead, the Fifth Circuit's narrowly drawn decision focused solely on whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules. The Court did not address how the *Sandin* analysis applied to the inmates' confinement.

The prison officials also attempt to create a circuit split where no such split exists. The prison officials allege that some circuits have interpreted *Sandin* by looking only as to whether "atypical and significant hardship" exists (the "replacement test") whereas other circuits have interpreted *Sandin* as requiring, in addition to "atypical and significant hardship," that the State create an entitlement by mandatory language (the "additional prong" test). The alleged circuit split rests upon prison officials' misreading of *Sandin* and the circuit court decisions. *Sandin* and the circuit court decisions do not employ different tests for similar deprivations. Instead, *Sandin* sets forth a "sliding scale" analysis which looks to the nature of the deprivation and employs different tests

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[1] 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

[2] Pet. at i.

depending upon the severity of the deprivation. All of the decisions cited by the prison officials were decided within the framework of *Sandin*'s "sliding scale" analysis.

Additionally, the prison officials urge this Court to come full circle and re-embrace the rules-based approach that this Court abandoned in *Sandin*. Rather than eliminating the undesirable effects claimed by the prison officials, a return to rules-based approach would resurrect the problems that led this Court to decide *Sandin* in the first place.

There is no circuit split and the Fifth Circuit did not take sides in a circuit split even if such a split exists. Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

## FACTS

This case presents the extraordinary – and possibly unique – circumstance of inmates being kept continuously in extended lockdown for decades. Two of the plaintiffs, Herman Wallace and Albert Woodfox, were placed in extended lockdown in 1972 after the murder of a prison guard. Wallace has remained continuously in extended lockdown for the last thirty-one years. Woodfox has been continuously in extended lockdown since 1972 except for a three year period when he was incarcerated in a parish jail. It appears likely that without judicial relief Wallace and Woodfox will remain in extended lockdown for the rest of their lives.

With regard to the third plaintiff, Robert Wilkerson, the prison officials err at page four of their Petition where

they state that Wilkerson was placed in extended lockdown for killing a fellow inmate. Wilkerson was first placed in extended lockdown in May 1972 approximately two weeks after his arrival at Angola.[3] Over a year later, on September 14, 1973, Wilkerson was indicted for the murder of a fellow inmate.[4] Wilkerson was convicted of the murder and remained continuously in extended lockdown until 2001 when he was released from prison after the Fifth Circuit granted Wilkerson's second habeas corpus petition.[5]

## I.

## THERE IS NO SPLIT IN THE CIRCUITS AS TO THE PROPER INTERPRETATION OF *SANDIN*.

### A. *Sandin*'s "sliding scale" analysis.

The prison officials have sought to create a circuit split where no such split exists. The prison officials allege that some circuits have interpreted *Sandin* by looking only as to whether "atypical and significant hardship" exists (the "replacement test") whereas other circuits have interpreted *Sandin* as requiring, in addition to "atypical and significant hardship," that the State create an entitlement by mandatory language (the "additional prong" test).

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[3] *Wilkerson v. Maggio*, 703 F.2d 909 (5th Cir. 1983).

[4] *State v. Brewer*, 301 So.2d 630 (La. 1974).

[5] *Wilkerson v. Cain*, 233 F.3d 886, 889 (5th Cir. 2000) (A successive habeas corpus petition will be granted only if the petitioner can prove that he is "actually innocent" of the crime of conviction).

The alleged circuit split rests upon the prison officials' misreading of *Sandin* and the circuit court decisions. *Sandin* and the circuit court decisions do not employ different tests for similar deprivations. Instead, *Sandin* sets forth a "sliding scale" analysis which looks to the nature of the deprivation and employs different tests depending upon the severity of the deprivation:

> Level 1. Deprivations that are not severe or are closely related to the original terms of confinement will not be considered as impinging upon a liberty interest even though state law or regulations may contain "mandatory language." *Sandin*, 515 U.S. at 481, 482, 115 S.Ct. at 2297, 2298.
>
> Level 2. Deprivations that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" may be considered as impinging upon a liberty interest provided that state law creates a liberty interest. *Sandin*, 515 U.S. at 479, 115 U.S. at 2300.
>
> Level 3. Deprivations that are so severe that they exceed the inmate's sentence "in such an unexpected manner as to give rise protection by the Due Process Clause of [their] own force" give rise to a liberty interest irrespective of state law. *Sandin*, 515 U.S. at 479-80, n.4, 484, 115 S.Ct. at 2297, n.4, 2300.

No decision cited by the prison officials acknowledges a circuit split. In order to give the impression of a circuit split, the prison officials quote isolated portions of various decisions without analyzing the bases upon which the circuits made their respective decisions. An analysis of the courts' actual rulings discloses no such split and that the

circuits are faithfully following *Sandin*'s "sliding scale" analysis.

### B. The Second and Third Circuit decisions cited by the prison officials were decided within *Sandin*'s "sliding scale" framework.

The Second and Third Circuit decisions cited by the prison officials are either not applicable at all or can be categorized as Level 1, Level 2 or Level 3 deprivations within *Sandin*'s "sliding scale" framework.[6]

In *Frazier v. Coughlin*,[7] the Second Circuit determined that the inmate failed to demonstrate a significant deprivation of a liberty interest because he did not show that his confinement in a segregated housing unit for twelve days was "dramatically different from the 'basic conditions of [his] indeterminate sentence.'"[8] This was a Level 1 deprivation because it did not constitute "atypical and significant hardship" even if state law or regulations contained mandatory language.

*Tellier v. Fields*[9] was a Level 2 case. The Second Circuit found that the inmate could establish a liberty

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[6] One Second Circuit decision cited by the prison officials is completely inapposite to the present case. *Anderson v. Recore*, 317 F.3d 194 (2nd Cir. 2003). In that case the State revoked an inmate's temporary release status and reincarcerated him without a hearing. The Second Circuit held with regard to work release programs, this Court's decision in *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148, 137 L.Ed. 270 (1997) had supplanted the *Sandin* analysis.

[7] 81 F.3d 313 (2nd Cir. 1996).

[8] *Id.* at 317.

[9] 280 F.3d 69 (2nd Cir. 2000).

interest because "a confinement of 514 days under conditions that differ markedly from those in the general population" was "atypical and significant."[10] The Second Circuit also found that the inmate was entitled to the process required by the language of the Code of Federal Regulations.[11]

*Torres v. Fauve*[12] was a Level 1 case where the Third Circuit held that 15 days in disciplinary detention and 120 days in "administrative segregation" was not "the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[13]

### C. The Seventh, Eighth, Tenth and D.C. Circuit decisions cited by the prison officials were decided within *Sandin*'s "sliding scale" framework.

All of the Seventh, Eighth, Tenth and D.C. Circuit decisions cited by the prison officials either did not involve liberty interests or can be categorized as Level 1, Level 2 or Level 3 deprivations within *Sandin*'s "sliding scale" framework.

*Hatch v. District of Columbia*[14] presented the issue as to whether a seven month confinement in administrative segregation constituted a Level 1 or Level 2 deprivation.

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[10] *Id.* at 80.

[11] *Id.* at 81.

[12] 292 F.3d 141 (3rd Cir. 2002).

[13] *Id.* at 151, citing *Sandin*, 515 U.S. at 486, 115 S.Ct. at 2293.

[14] 184 F.3d 846 (D.C. Cir. 1999).

The D.C. Circuit held that the District of Columbia regulations limited official discretion to place prisoners in segregative confinement. However, the Court remanded the case for a determination as to the appropriate baseline to evaluate whether the inmate's administrative segregation constituted "atypical and significant hardship."[15]

The two Seventh Circuit decisions cited by the prison officials concerned Level 1 deprivations. *Rowe v. Shake*[16] concerned alleged delays in incoming mail to a prisoner. The Court ruled that no liberty interest was involved based on *Sandin*'s holding that regulations alone cannot amount to a deprivation of liberty. In *Hanks v. Wagner*[17] the Seventh Circuit ruled that a transfer to another prison within the State did not constitute a deprivation of liberty.[18]

In *Hake v. Clarke*,[19] an inmate claimed that he was unconstitutionally denied a transfer from minimum security to community custody. Inasmuch as the district court decision had been rendered prior to *Sandin*, the Eighth Circuit simply remanded the case for "an analysis of *Sandin*."[20]

Neither of the Tenth Circuit decisions cited by the prison officials involved liberty interests. In *Cosco v.*

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[15] *Id.* at 858.

[16] 196 F.3d 778 (7th Cir. 1999).

[17] 128 F.3d 1173 (7th Cir. 1997).

[18] *Id.* at 1174.

[19] 91 F.3d 1129 (8th Cir. 1996).

[20] *Id.* at 1132.

*Uphoff*,[21] the plaintiffs asserted that the mandatory language in regulations governing what prisoners could keep in their cells created a property interest; they made no allegation as to any impingement of their liberty interests.[22] In *Riddle v. Mondragon*,[23] sex offenders complained that they were not included in certain programs such as "minimum" custody release, work release and community corrections. The Tenth Circuit held that the failure to include sex offenders within the challenged policies should be analyzed as a denial of equal protection, not as a denial of due process under *Sandin*.[24]

## II.

## THIS COURT SHOULD REJECT THE PRISON OFFICIALS' PLEA TO RETURN TO THE *HEWITT* RULES-BASED APPROACH WHICH THIS COURT ABANDONED IN *SANDIN*.

Prior to *Sandin* the courts looked to the language of state regulations to determine whether they bestowed an entitlement.[25] This Court noted that in *Sandin* that such a "rules-based" approach had negative consequences:

> By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the

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[21] 195 F.3d 1221 (10th Cir. 1999), *cert. denied*, 531 U.S. 1081, 121 S.Ct. 784, 148 L.Ed.2d 680 (2001).

[22] *Id.* at 1222.

[23] 83 F.3d 1197 (10th Cir. 1996).

[24] *Id.* at 1206.

[25] *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983).

> deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.
>
> * * *
>
> *Hewitt* has produced at least two undesirable effects. First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment . . . States may avoid creation of "liberty" interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel.
>
> Second, the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little off-setting benefit to anyone.

*Sandin*, U.S. at 480-82, 115 S.Ct. at 2299-2300.

Ironically, the prison officials here urge this Court to return to the *Hewitt* rules-based analysis:

> the "additional prong" theory advanced by the prison officials allows the courts to resolve the inmates' procedural due process claims by examining the 2 short prison rules identified by the inmates as the source of their liberty interest in release from lockdown.[26]

Thus, the prison officials urge this Court to come full circle and re-embrace the rules-based approach which this Court abandoned in *Sandin*. Rather than eliminating the

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[26] Pet. p. 17.

undesirable effects claimed by the prison officials, a return to *Hewitt's* rules-based approach would resurrect the problems that led this Court to decide *Sandin* in the first place.

## III.

## THE FIFTH CIRCUIT DID NOT TAKE SIDES IN A CIRCUIT SPLIT.

The Fifth Circuit took no definitive position as to how *Sandin* applied in the present case. Although the Court affirmed the district court's order denying the prison officials' Motion to Dismiss, it was on the basis that the Court could not determine whether the inmates asserted sufficient facts that would give rise to a denial of a liberty interest. The Fifth Circuit held that the district court must first determine whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules:

> In resolving the nature of the liberty interest and the process that is due for confinement of prisoners in extended lockdown under these circumstances, it is crucial to know whether, based on their crimes of conviction, the inmates' confinement is the result of an initial classification by prison officials as opposed to confinement for violations of less serious prison disciplinary rules.[27]

The Fifth Circuit took no position as to whether the *Sandin* test applied in the present case. The Court simply held that:

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[27] Pet., App. A at 8.

> if the inmates confinement in extended lockdown is not the result of their initial classification, the *Sandin* test would be triggered.[28]

Since the focus of the Fifth Circuit's decision was whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules, the Court did not address the nature of the deprivation itself nor did it rule as to how the deprivation should fit in the *Sandin* analysis. Therefore, the Fifth Circuit did not take sides in a circuit split even if such a split exists.

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[28] Pet., App. A at 9.

## CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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